

DECONSTRUCTING THE ESTABLISHMENT CLAUSE

Kevin Cain, J.D.

[**EDITOR'S NOTE:** The following article was written by A.P. auxiliary staff writer, Kevin Cain, who holds degrees from Freed-Hardeman University (B.S., M.Min.) and the Doctor of Jurisprudence from South Texas College of Law. A former Briefing Attorney of The First Court of Appeals, his current practice focuses on litigation at the trial and appellate levels in both State and Federal Courts.]

One wonders whether the Founding Fathers ever envisioned the intense... at times, malevolent...discourse these simple, instructive words would evoke throughout the land for over 200 years. Should "In God We Trust" be removed from our currency? Should the opening of Court not begin with an incantation to God to "save the United States and this Honorable Court"? Indeed, should reference to an awareness of God be stricken from the federal Constitutional oath of office? Or from the revered Declaration of Independence? Where does the injunction of the First Amendment lead us? (*Doe v. Tangipahoa*..., 2009).

I was in my car listening to a talk radio program where the subject of the day was the "separation of church and State." The callers' opinions were all across the board from the far left to the far right and everything in between. One gentleman finally called in and had the nerve to assert that the First Amendment nowhere contains

the phrase "separation of church and State." And then the fireworks began. Caller after caller (including the host) blasted this neophyte for claiming the First Amendment did not contain this purported phrase.

In reality, the First Amendment has two religious clauses. It states, "Congress shall make no law respecting an **establishment** of religion, or prohibiting the **free exercise** thereof" (*Bill of Rights*, 1789, emp. added). The first clause is known as the Establishment Clause, and the second is known as the Free Exercise Clause. Not only is the phrase "separation of church and State" conspicuously absent from this short sentence we call the First Amendment, but it is not anywhere to be found in the entire *Constitution of the United States* (nor in any law passed by Congress).

THE ORIGIN OF "SEPARATION OF CHURCH AND STATE"

Why is it, then, that so many people mistakenly, yet sincerely, believe that this phrase is somewhere found within the First Amendment? More importantly, why do so many believe that this phrase means that the government can have no involvement in religion or recognition of God in any form whatsoever? The origin of this phrase can be traced back to an

1802 letter penned by Thomas Jefferson to the Danbury Baptist Association. The Danbury Baptist Association of Connecticut wrote a letter to President Thomas Jefferson expressing concern over their lack of state constitutional protection of religious liberty and against a government establishment of religion. Specifically, the Danbury Baptists stated in their letter to President Jefferson, "Our Sentiments are uniformly on the side of Religious Liberty—That Religion is at all times and places a matter between God and individuals—

CONTENTS

ARTICLES

- Deconstructing the Establishment Clause*
Kevin Cain 9

DEPARTMENTS

- Speaking Schedules 13
Note from the Editor
*A Medley of Matters: Bound Volumes,
Web Site, & New VBS* 16

RESOURCES

- God Did Not Condone Rape* 5-R
In The News 8-R
Q & A 8-R

www.APOLOGETICSPRESS.ORG

That no man ought to suffer in name, person, or effects on account of his religious Opinions—That the legitimate Power of civil government extends no further than to punish the man who works ill to his neighbor” (“Danbury Baptist...,” 1801). The Danbury Baptists were concerned that a religious majority might establish a state religion at the expense of the liberties of religious minorities.

Thomas Jefferson responded by letter dated January 1, 1802. He agreed with the Danbury Baptists’ views on religious liberty and the separation of civil government from involvement with religious doctrine and practice. Jefferson wrote: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus **building a wall of separation between Church & State**” (“Jefferson’s Letter...,” 1802, emp. added). Jefferson’s statement regarding “a wall of separation between Church & State” was a mere recognition that the government would not endorse or back a single religious group to the detriment of other Christian sects. However, the use of

that phrase today bears no relation to what President Jefferson meant when he penned those words in 1802.

THE HISTORICAL CONTEXT OF “SEPARATION OF CHURCH AND STATE”

Many take the view that the Framers of the First Amendment intended for the government to be completely detached from any religious activity and neutral in all religious matters. In other words, they equate the phrase “separation of church and State” with absolute refusal by the government not only to engage in any religious activity, but also to passively allow any religious activity in the public sphere. This interpretation is far removed from the context or meaning of the phrase coined by Jefferson in 1802, much less the First Amendment.

To understand what the First Amendment does and does not mean, it would be helpful to look to the writings and religious/political sentiments expressed by the author and primary proponent of the First Amendment. James Madison submitted the original draft of the First Amendment to Congress, and Thomas Jefferson was

one of the key supporters of the First Amendment.

It is clear from Madison’s own writings that he was concerned with the union of church and State as was prevalent in Europe at that time. The First Amendment was designed to prevent the government from joining forces with a particular religious organization as a government-endorsed religion. This can be seen in the original proposed draft of the First Amendment submitted by Madison. “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any **national religion** be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed” (*Wallace v. Jaffree*, 1985, emp. added). “[Madison’s] original language ‘nor shall any national religion be established’ obviously does not conform to the ‘wall of separation’ between church and State idea which latter-day commentators have ascribed to him” (*Wallace v. Jaffree*, 1985). Ironically, when the original draft of the First Amendment was later revised and debated in the House on August 15, 1789, Representative Peter Sylvester of New York expressed his dislike for the revised version, because it might have a tendency “to abolish religion altogether” (*Wallace v. Jaffree*, 1985). However, Madison stated during this debate that “he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience, or that one sect might obtain a pre-eminence, or two combined together, and establish a religion to which they would compel others to conform” (*Annals of Congress*, 1789, 1:758). While the Supreme Court has never adopted this interpretation of the Establishment Clause, this is **the exact meaning articulated by its own author, James Madison**. After reviewing this same historical context of the

Reason & Revelation is published monthly by Apologetics Press, Inc. Periodicals postage paid at Montgomery, AL. **POSTMASTER:** Send address changes to **Reason & Revelation**, 230 Landmark Dr., Montgomery, AL 36117; **ISSN:** [1542-0922] **USPS#** 023415.

Apologetics Press is a non-profit, tax-exempt work dedicated to the defense of New Testament Christianity. Copyright © 2010. All rights reserved.

Editor:

Dave Miller, Ph.D.*
(*Communication, Southern Illinois University)

Associate Editor:

Kyle Butt, M.A.*
(*New Testament, Freed-Hardeman University)

Annual Subscription Rates:

\$10.00	Domestic
\$ 8.00	Domestic Bulk (5+ to same address)
\$16.00	Canada & Overseas Airmail

General inquiries, changes of address, or international callers:

Phone: (334) 272-8558
Fax: (334) 270-2002

Orders:

Phone: (800) 234-8558
Fax: (800) 234-2882

On-line Web store/catalog, subscription order/renewal form, current issues, archives, and other information (all orders processed on a secure server):

URL: www.ApologeticsPress.org
URL: www.ApologeticsPress.org/espanol
E-mail: mail@ApologeticsPress.org

Discovery—Scripture & Science for Kids is a sister publication for children. For more information, please contact our offices or visit the Discovery Web site at:

URL: www.DiscoveryMagazine.com



© COPYRIGHT, APOLOGETICS PRESS, INC., 2009, ALL RIGHTS RESERVED

FEBRUARY 2010 **REASON & REVELATION** 30(2):10

Establishment Clause, Chief Justice Rehnquist concluded:

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion (*Wallace v. Jaffree*, 1985).

Madison subscribed to the position that religion should have a place in the role of government.

Moreover, James Madison was a religious man who strongly believed that all public officials and governmental leaders should publicly profess their belief in Christianity:

I have sometimes thought there could not be a stronger testimony in favor of religion or against temporal enjoyments, even the most rational and manly, than for men who occupy the most honorable and gainful departments and [who] are rising in reputation and wealth, publicly to declare their unsatisfactoriness by **becoming fervent advocates in the cause of Christ**; and I wish you may give in your evidence in this way" ("Madison Letter...", 1773, emp. added).

Madison was also one of the drafters who passed the Virginia Constitution, which carries the phrase, "It is the mutual duty of all to practice Christian forbearance, love, and charity toward each other" (*The Proceedings of...*, 1776, p. 103). Simply put, Madison was a strong believer that governmental leaders, legislators, and even legislation should recognize and espouse submission to Christ.

In his first inaugural address, James Madison recognized that the destiny and prosperity of a nation are directly

linked to the blessings and guidance given by God.

In these my confidence will under every difficulty be best placed, next to that which we have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future (Madison, 1809).

In other words, Madison subscribed to the position that religion should have a place in the role of government. Moreover, Madison expressed a clear belief that the fate of a government was intertwined with its dependence upon and relationship with God.

Thomas Jefferson was also outspoken and clear in his opposition to a church-sponsored religion that superimposed its will on the people. Jefferson stated that he was unequivocally opposed to the government endorsing a state or national religion, much like the system that so many of our Founding Fathers left behind in England. "I am for freedom of religion, and against all maneuvers to bring about a legal ascendancy of one sect over another" (Jefferson, 1799). Jefferson was especially opposed to Roman Catholicism and any manifestation of entanglement of church and State where the church assumes the role of civil government. "But a short time elapsed after the death of the great reformer of the Jewish religion [i.e., Jesus—KC], before his principles were departed from by those who professed to be his special servants [i.e., Roman Catholicism, for which Jefferson had little tolerance], and perverted into an engine for enslaving mankind, and aggrandizing their oppressors in Church and State" (Jefferson, 1810).

Jefferson was not an enemy of religion; rather, he embraced and promoted religion. In his first inaugural address, Jefferson, like Madison, linked national

prosperity to a national dependence on God and religion:

Let us, then, ...enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter—with all these blessings, what more is necessary to make us a happy and a prosperous people? (Jefferson, 1801).

In his second inaugural address, Jefferson made similar statements, but with a clearer endorsement of the God of the Bible:

I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessities and comforts of life; who has covered our infancy with his providence, and our riper years with his wisdom and power; and to whose goodness I ask you to join with me in supplications, that he will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations (Jefferson, 1805).

Jefferson, like Madison, linked national prosperity to a national dependence on God and religion.

Simply put, Jefferson publically called upon the God of the Israelites and the God of the Bible, and likewise called upon the citizenry of this country to pray to that same God. This is clearly not the wall of separation that so many have misconstrued from Jefferson's letter to the Danbury Baptists. Jefferson did not state we should all go home and privately pray to the supreme being of our choice. Rather, Jefferson used the



*Jefferson used the office of the
President of these United States
to direct this nation to call
upon the God of the Bible.*

office of the President of these United States to direct this nation to call upon the God of the Bible in prayer to beseech the blessings and guidance of the one true God. Whatever that “wall of separation” may be, it is certainly not what so many scholars and citizens presume it to mean today.

Interestingly, at about this same time in history when the First Amendment was ratified (December 15, 1791), the United States government was engaged in numerous acts that many would presume to be unconstitutional today under a contemporary interpretation of the First Amendment. However, these governmental actions simply demonstrate that Congress did not intend for the First Amendment to be a literal wall of separation between church and State.

The *Northwest Ordinance*, passed by Congress in 1789, provided that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged” (1789, 1:52). Like Madison and Jefferson in their inaugural addresses, Congress also drew a direct link between religion and government and recognizing that government and proper education cannot stand without religion and morality.

On the day after the House of Representatives voted to adopt the final version of the First Amendment Establishment Clause, Representative Elias Boudinot proposed a resolution asking the President to issue a Thanksgiving Day Proclamation to “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and

signal favors of Almighty God” (*Annals of Congress*, 1789, 1:949). This resolution was passed on September 25, 1789. Within two weeks, George Washington responded:

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquility, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us (Washington, 1789).

Likewise, in President Washington’s farewell address in 1796, he declared:

Of all the dispositions and habits which lead to political prosperity, **religion and morality are indispensable supports**. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness.... The mere politician, equally with the pious man, ought to respect and to cherish them (1796, emp. added).

President Washington made clear that a government cannot exist without “religion and morality.” These events and actions of the government, near the time the Establishment Clause was enacted, demonstrate that **the First Amendment was not designed to extract all religion from the government**. To the contrary, the political leaders

of the day, the Framers, congressmen, and even the Presidents surrounding the time the Establishment Clause was passed, were clear advocates for governmental endorsement of religion in general, and Christianity in particular.

Contrast the language and endorsement of religion from Washington, Madison, and Jefferson (and nearly every President that followed) with the state of the First Amendment today. Presidents Washington, Madison, and Jefferson used the federal office of the President to persuade the people to submit to the moral guidelines of the Bible and pray to the God of the Bible. Compare that with the United States Supreme Court which held in 1985 that a public school could not allow a moment of silence for students to pray to the supreme being of their choice (*Wallace v. Jaffree*, 1985). What has happened in our national history that we have devolved from a point in time where our highest ranking national leader could actively promote prayer and submission to the God of the Bible, but today schools cannot passively even allow a moment of silence at the start of the day? As Justice Rehnquist stated in his dissent in *Wallace v. Jaffree*: “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years” (1985).

MAKING A LANDFILL OUT OF A MOLE-HILL

From this simple phrase, “separation of church and State,” much has been presumed and contorted to satisfy the trends and leanings of our culture. When a straightforward application of the First Amendment does not reach the desired result, obscure and complicated tests are fashioned to bewilder and lead to a conclusion that unassuming and sober-minded people would never reach. A multi-pronged and amorphous test

God Did Not Condone Rape

Kyle Butt, M.A.

Militant atheists of the 21st century delight in accusing God of condoning the most heinous immoralities. They insist that the God of the Bible, especially of the Old Testament, was a murderous villain guilty of far worse than His human subjects. Richard Dawkins accused God of being a “misogynistic, homophobic, racist, infanticidal, genocidal, filicidal, pestilential, megalomaniacal, sadomasochistic, capriciously malevolent bully” (2006, p. 31).

One attempt that has been made to bolster these unfounded accusations is to suggest that in the Old Testament God condoned rape. Dan Barker commented: “If God told you to rape someone, would you do it? **Some Christians, ignorant of biblical injunctions to rape**, might answer, ‘God would never ask me to do that’” (Barker, 1992, p. 331, emp. added). If the honest truth seeker were to ask to see the “biblical injunctions to rape,” he would be struck by the fact that no such injunctions exist.

The passage that is most often used to “prove” that God condones rape is Numbers 32:25-40. In this passage, the young women who were taken captive after Moses destroyed the Midianites were divided between the Israelites and the priests. The priests were given responsibility for 32 of the women. Skeptics often suggest that these women were supplied so that the priests could abuse them sexually and rape them. But nothing could be further from the truth. The skeptic errs greatly in this regard either due to his ignorance of God’s instructions or willful dishonesty.

In Deuteronomy 21:10-14, Moses specifically stated what was to be done with female captives:

When you go out to war...and you see among the captives a beautiful woman, and desire her and **would take her for your wife**, then you shall bring her home to your house, and she shall shave her head and trim her nails. She shall put off the clothes of her captivity, remain in your house, and mourn her father and her mother a full month; **after that you may go in to her and be her husband, and she shall be your wife** (emp. added).

It is important to understand that God has never condoned any type of sexual activity outside of a lawful marriage. The only way that an Israelite would be morally justified in having sexual intercourse with a female captive was if he made her his wife, granting to her the rights and privileges due to a wife.

Notice that the Israelite male could not “go in to her” (a euphemism for sexual intercourse) until she had observed a period of mourning and cleansing, and he could only “go in to her” with the intent of being her husband.

When the skeptics’ allegations about God condoning rape are demolished by the very clear instructions in Deuteronomy 21, the attack is usually shifted, and God is accused of being unjust for allowing war prisoners or slavery of any kind, regardless of whether or not rape was permitted. While these allegations about slavery have been dealt with decisively in other places (Butt, 2005a), it is important not to lose sight of the fact that shifting the argument to slavery is a red herring to draw attention away from the original accusation that God condoned rape.

For the skeptic to imply that God condoned rape, using Numbers 32, without mentioning Moses’ instructions in Deuteronomy 21, is unconscionable. It is simply another instance of dishonest propaganda designed to discredit God and the Bible. The irony of the skeptics’ position is that if atheism is true, the skeptic has no grounds upon which to claim that rape is morally wrong (Butt, 2005b). In fact, in my debate with Dan Barker, Barker admitted that fact, and stated that under certain circumstances, rape would be a **moral obligation** (Butt and Barker, 2009).

In reality, God’s ways and actions have always been fair, equitable, and just. But the errant thinking and self-contradiction of the skeptical worldview continues to show itself to be unjust in its criticism of God, and immoral in its practical application.

REFERENCES

- Barker, Dan (1992), *Losing Faith in Faith: From Preacher to Atheist* (Madison, WI: Freedom From Religion Foundation).
- Butt, Kyle (2005a), “Defending the Bible’s Position on Slavery,” [On-line], URL: <http://www.apologeticspress.org/articles/368>.
- Butt, Kyle (2005b), “Rape and Evolution,” [On-line], URL: <http://www.apologeticspress.org/articles/306>.
- Butt, Kyle and Dan Barker (2009), *The Butt/Barker Debate: Does the God of the Bible Exist?* (Montgomery, AL: Apologetics Press).
- Dawkins, Richard (2006), *The God Delusion* (New York: Houghton Mifflin).



While it is extremely difficult to measure the extent to which religion impacts Americans, one polling organization has attempted to do so using four criteria. The poll was designed to acquire a sense of how the 50 states compare with each other on the matter of which has the most religious population. The four criteria used were the importance of religion in people's lives, frequency of attendance at worship services, frequency of prayer, and absolute certainty of belief in God ("How Religious...?", 2009). As one might expect, more Americans in the "Bible Belt" states indicate that religion is very important in their lives. Mississippi has the highest percentage of its population so indicating (82%), followed by Alabama and Arkansas at 74%, Louisiana at 73%, Tennessee at 72%, South Carolina at 70%, Oklahoma and North Carolina at 69%, Georgia at 68%, Kentucky and Texas at 67%. The states with the lowest percentage of its citizens indicating that religion is important in their lives are New Hampshire and Vermont with 36%. **Sadly, the national average**

is 56%. Think of it. Only 56% of Americans say that religion is important to their everyday living. Specifically, only 39% of Americans say they attend worship at least once a week, only 58% say they pray at least once a day, and only 71% say they believe in God with absolute certainty.

So what? What does it matter if the Christian religion has less and less impact on Americans? Quite simply, the nation will unravel and culminate its illustrious existence in disaster. So said the Founders of the Republic (cf. Miller, 2008), and so says the Bible (e.g., 2 Chronicles 7:14-22).

Dave Miller

REFERENCES

"How Religious Is Your State?" (2009), The Pew Forum on Religion & Public Life, December 21, [On-line], URL: <http://pewforum.org/docs/?DocID=504>.

Miller, Dave (2008), *The Silencing of God: The Dismantling of America's Religious Heritage* (Montgomery, AL: Apologetics Press).

QUESTION & ANSWER

Q How could Moses have written Genesis 36:31 ("Now these were the kings who reigned in the land of Edom **before any king reigned over the children of Israel**," emp. added)? Doesn't this wording concerning Israel's distant, future monarchy prove (as skeptics allege) that Moses did not pen the book of Genesis?

A There are two logical reasons why Moses could mention the future Israelite kingship. First, Moses knew about the express promises that God had made to Abraham and Jacob concerning the future kings of Israel. On one occasion, God informed Abraham and Sarah that many kings would be among their posterity. He promised Abraham that Sarah would become "a mother of nations; **kings of peoples shall be from her**" (Genesis 17:16, emp. added). Years later (and just one chapter before the verse in question), when God appeared to Jacob at Bethel and changed his name to Israel, He said: "I am God Almighty. Be fruitful and multiply; a nation and a company of nations shall proceed from you, and **kings shall come from your body**" (Genesis 35:11, emp. added).

A second reason Moses had knowledge of the Israelite kingship before it was known experientially is simply because Moses was **inspired** (John 5:46; Mark 12:26; cf. Exodus 20:1; 2 Timothy 3:16-17). For someone to say that the author of Genesis could not have been Moses, because the author spoke generally of Israelite kings prior to their existence, totally ignores the fact that Moses received special revelation from Heaven. Nowhere is this seen more clearly than in Deuteronomy 17:14-15. Here Moses prophetically stated:

When you come to the land which the Lord your God is giving you, and possess it and dwell in it, and say, "I will set a king over me like all the nations that are around me," **you shall surely set a king over you whom the Lord your God chooses**; one from among your brethren you shall set as king over you; you may not set a foreigner over you, who is not your brother (emp. added).

Under normal circumstances, such foreknowledge would be impossible. One must keep in mind, however, that "with God all things are possible" (Matthew 19:26)—and God was with Moses (cf. Exodus 3:12; 6:2; 25:22).

Eric Lyons



can allow anyone to reach whatever conclusion they desire. This dilemma is especially true when looking at the judicial application of the Establishment Clause in the last 50 years.

Over the years, the United States Supreme Court has fashioned several tests when scrutinizing the Establishment Clause of the First Amendment. There is much debate about whether all these tests are still viable, whether one test overrules another, or whether the tests are merely fact-specific as to their application. One thing is clear: **these tests do not reflect the sentiment of the Founding Fathers** and the states that drafted, supported, and passed this amendment into law.

It is no surprise that media sources, entertainers, academia, and the government have veered further to the left, and grown more liberal and tolerant in the arena of morality. Unfortunately, courts have likewise followed the same path, reflecting the same liberal trends we see in every other facet of contemporary culture. While many who misinterpret the First Amendment clamor for **freedom of religion**, they have actually traveled down a path toward **freedom from religion**, which eventually results in **hostility toward religion**. Likewise, courts' interpretations of the Establishment Clause have moved in a direction that is more offensive and antagonistic toward

religion (or, at a minimum, allows others to superimpose irreligion over religion).

This simple language known as the Establishment Clause has spawned a flurry of judicially created tests and paradigms that further confuse and muddy the waters of the religious/political landscape. Rather than providing a reasoned interpretation leading to predictable results, these tests serve as the springboard to allow courts to manipulate the outcome of a case when applying the Establishment Clause—an amendment whose meaning was once clear and obvious. However, when a test only serves to further confuse and create more questions than it answers, its usefulness is short-lived, and its purpose is suspect at best.

THE LEMON TEST

The first Establishment Clause test created by the United States Supreme Court is a three-part analysis often referred to as the *Lemon* test. The *Lemon* test derives its name from the 1971 case styled *Lemon v. Kurtzman*, in which the Court ruled that a state program providing aid to religious elementary and secondary schools violated the Establishment Clause (*Lemon v. Kurtzman*, 1971). Under the *Lemon* test, a court must (1) determine whether the law or government action in question has a bona fide **secular** purpose; (2) determine whether the state action

has the primary effect of advancing or inhibiting religion; and (3) consider whether the action excessively entangles religion and government. These criteria are sometimes referred to respectively as the (1) “effects” prong, (2) the “purpose” prong, and (3) the “entanglement” prong. There is a lack of consensus as to how this test is to be applied. Are courts required to satisfy all three prongs, or do they merely balance these factors? Are all elements needed, or are only some needed, and if so, which elements are required and which are discretionary? Moreover, there is a question as to whether the *Lemon* test is still good law today, or has it been effectively overruled by the many other tests subsequently created by the United States Supreme Court.

LEMON WITH A TWIST

In 1997, the United States Supreme Court appeared to modify the *Lemon* test in *Agostini v. Felton*. The Court combined the last two elements of the *Lemon* test, using only the purpose prong and a modified version of the effects prong (*Agostini v. Felton*, 1997). The *Agostini* Court delineated three principal criteria to determine whether government action has the primary effect of advancing religion: (1) government indoctrination, (2) defining the recipients of government benefits based on religion, and (3) excessive entanglement between government and religion (1997). In other words, we started with a three-pronged test which has now been modified into a two-pronged test by integrating two of the original prongs and adding a new three-part inquiry to help explain the new prong. Anyone confused yet? But the tests do not stop here.

THE COERCION TEST

The “coercion test” owes its genesis to Justice Anthony Kennedy’s dissent in *County of Allegheny v. ACLU*. Under the coercion test, the government violates the Establishment Clause if it

SPEAKING SCHEDULES

Kyle Butt

February 7	Florence, AL	(256) 764-8824
March 5-7	Chesapeake, VA	(810) 635-4544

Eric Lyons

February 6-7	Houston, TX	(281) 440-9898
February 28 - March 2	Benton, KY	(270) 527-1271

Dave Miller

January 31	Hartselle, AL	(256) 773-6124
February 7/14	Montgomery, AL	(334) 264-2985
February 19-21	Wildwood, FL	(352) 330-2032



(1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will (*County of Allegheny v. ACLU*, 1989). What would or would not coerce a person is the subject of great debate among scholars and judges, and is clearly a highly subjective standard. However, the coercion test is more strictly applied when involving grades K through 12. In *Lee v. Weisman*, the Supreme Court observed that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools” (1992). However, *Lee v. Weisman* also illustrates the subjectivity and lack of predictability when applying the coercion test. In that case, Justice Kennedy wrote the majority opinion, and Justice Scalia wrote a dissent. Both justices are professed devout Catholics and former altar boys. Both applied the same coercion test and came to opposite results: Justice Kennedy found that the prayer at issue in that case violated the Establishment Clause, while Justice Scalia found that the same prayer did not violate the Establishment Clause (1992). Given this lack of clarity, it seems only judicially natural that another ambiguous test should be crafted to further confuse and bewilder the legal landscape regarding the Establishment Clause.

THE ENDORSEMENT TEST

Under Justice Sandra Day O’Connor’s “endorsement test,” government action violates the Establishment Clause if it amounts to an “endorsement of religion” (*Lynch v. Donnelly*, 1984). Under the endorsement test, government action or legislation is invalid if it creates a perception in the mind of a “reasonable observer” that the government is either endorsing or disapproving of religion. Justice O’Connor wrote: “The Establishment Clause prohibits government from mak-

ing adherence to a religion relevant in any way to a person’s standing in the political community” (1984). A person is coerced under the coercion test “when the government conveys ‘a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’” (1984). The endorsement test is often applied when the government is actively expressing itself, such as graduation prayers, religious signs on government property, and religion in school curriculum. As expected, there is considerable disagreement as to what constitutes a “reasonable observer” under the endorsement test. Apparently, the reasonable observer is whatever the judge decides this hypothetical person to be. As such, the reasonable observer will vary from judge to judge. However, does the reasonable observer vary based on the jurisdiction? For example, the “reasonable observer” in Muscle Shoals, Alabama will be quite different from the “reasonable observer” in San Francisco, California. Moreover, on what basis is the decision made that the observer in Muscle Shoals is unreasonable, other than the superimposed, yet subjective, opinion of a judge who unilaterally decides that to be the case? With more questions and more unresolved issues, surely another test or two is called for.

NEUTRALITY

The concept of neutrality in Establishment Clause decisions requires that the government neither be an ally nor an adversary of religion. This analysis (not so much a formal test as a relaxed analysis) is often applied in cases involving funding or some form of aid given to religious organizations or schools (*Zelman v. Simmons-Harris*, 2002; *Mitchell v. Helms*, 2000). The focus in this approach is an inquiry into the individual’s or institution’s control over the funds and equal treatment

between religious and non-religious groups.

THE FABRIC OF AMERICA TEST

This test, if it can, in fact, be called a “test,” originates from the case of *Marsh v. Chambers*. After observing the extensive history of government-paid chaplains and legislative prayer, the United States Supreme Court concluded: “In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society” (*Marsh v. Chambers*, 1983). It is disputed as to whether this is actually a test or, rather, a mere anomaly in Supreme Court jurisprudence, or a unique application of one of the other Establishment Clause tests. Nevertheless, the United States Supreme Court held that prayer to open the Nebraska Legislative Session was not unconstitutional because of its long history. As such, the Court ruled that this practice was a part of the fabric of America and, hence, did not violate the Establishment Clause (1983). According to the logic of *Marsh v. Chambers*, if a practice was instituted a long time ago, the initiators of this practice must have had a secular or non-religious purpose in mind, but if the practice is more recent, the instigators clearly had a religious purpose in mind. This amorphous and backwards approach would presume that Americans are becoming more and more religious, in spite of every secular indicator to the contrary.

MUCH LEARNING IS DRIVING YOU MAD!

At this point in our analysis, the words of Festus come to mind, when he shouted, “Paul, you are beside yourself. Much learning is driving you mad!” (Acts 26:24). While Paul was clearly not insane, but was speaking words that were reasonable and true (vs. 25), “reason” and “truth” are not the words that come to mind when survey-



ing the dizzying array of Establishment Clause tests that courts have concocted to reflect the leanings and trends of our contemporary culture. While sifting through all this madness—these tests, multiple elements, sub-elements, and new tests—it now becomes clear how we have digressed from a simple, straightforward Establishment Clause with a clear original purpose and history, and how we now find ourselves living in an age where the government has not only sterilized itself from all Christian religion, but is even hostile and adverse toward Christianity. Scholarly smoke-screens, guised in complex and multifarious tests created over an extended period of time, hope to eventually erase history and overrule the original intent of constitutional language.

It is important to know the many tests that courts have contrived in an effort to further estrange and remove religion from our government, communities, schools, and way of life. We should be familiar with these tests so that we can combat those who try to use them to justify their anti-religious views. We should combat them with the historical context of our Founding Fathers, even the authors of the First Amendment itself. Without this knowledge, some people may even be convinced that phrases like “separation of church and State” are actually found somewhere in the pages of our *Constitution*. Rewriting history is a deceptive and popular way to persuade people. While it is obviously inconsistent and insincere to close one’s eyes to reality and history, it is not without precedent. As George Orwell described it:

And if all others accepted the lie which the Party imposed—if all records told the same tale—then the lie passed into history and became the truth. “Who controls the past” ran the Party slogan, “controls the future: who controls the present controls the past” (1949, Part 1, Chapter 3).

Or, as Reich Minister of Propaganda in Nazi Germany under Hitler, Joseph Goebbels, put it:

If you tell a lie big enough and keep repeating it, people will eventually come to believe it. The lie can be maintained only for such time as the State can shield the people from the political, economic and/or military consequences of the lie. It thus becomes vitally important for the State to use all of its powers to repress dissent, for the truth is the mortal enemy of the lie, and thus by extension, the truth is the greatest enemy of the State (1941).

We should be aware of the historical context and proper meaning of the First Amendment. We should also be aware of the alleged “arguments” and “legal tests” that have mutated over the years, allowing courts to confuse and delude people into an interpretation and application of the First Amendment that would be unrecognizable to its framers.

REFERENCES

- Annals of Congress* (1789), [On-line], URL: <http://memory.loc.gov/ammem/am-law/lwac.html>.
- Agostini v. Felton*, 521 U.S. 203 (1997).
- Bill of Rights* (1789), The National Archives, [On-line], URL: http://www.archives.gov/exhibits/charters/bill_of_rights.html.
- Constitution of the United States* (1789), [On-line], URL: <http://www.archives.gov/exhibits/charters/constitution.html>.
- County of Allegheny v. ACLU*, 492 U.S. 573 (1989).
- “Danbury Baptist Association’s Letter to Thomas Jefferson” (1801), October 7, [On-line], URL: http://www.stephen-jaygould.org/ctrl/dba_jefferson.html.
- Doe v. Tangipahoa Parish School Bd.*, WL 1789425, F.Supp.2d (E.D. La., 2009).
- Goebbels, Joseph (1941), *Die Zeit ohne Beispiel* (Munich: Zentralverlag der NSDAP), [On-line], URL: http://thinkexist.com/quotes/joseph_goebbels/.
- Jefferson, Thomas (1799), “Letter to Elbridge Gerry, January 26, 1799,” [On-line], URL: <http://www.positiveatheism.org/hist/jeff1055.htm>.
- Jefferson, Thomas (1801), “First Inaugural Address,” The Avalon Project at Yale Law School, [On-line], URL: http://avalon.law.yale.edu/19th_century/jefinau1.asp.
- Jefferson, Thomas (1805), “Second Inaugural Address,” The Avalon Project at Yale Law School, [On-line], URL: http://avalon.law.yale.edu/19th_century/jefinau2.asp.
- Jefferson, Thomas (1810), “Letter to Samuel Kercheval, January 19, 1810,” Image 530, The Thomas Jefferson Papers Series 1. General Correspondence. 1651-1827, Library of Congress, [On-line], URL: http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page044.db&recNum=529&itemLink=%2Fammem%2Fcollect%2Fjefferson_papers%2Fmtjser1.html&linkText=6.
- “Jefferson’s Letter to the Danbury Baptists” (1802), January 1, Library of Congress, [On-line], URL: <http://www.loc.gov/loc/lcib/9806/danpre.html>.
- Lee v. Weisman*, 505 U.S. 577 (1992).
- Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- Lynch v. Donnelly*, 465 U.S. 668 (1984).
- Madison, James (1809), “First Inaugural Address, Saturday, March 4,” [On-line], URL: <http://www.bartleby.com/124/pres18.html>.
- “Madison Letter to Bradford” (1773), The RJ&L Religious Liberty Archive, September 25, [On-line], URL: http://churchstatelaw.com/historicalmaterials/8_7_1.asp.
- Marsh v. Chambers*, 463 U.S. 783 (1983).
- Mitchell v. Helms*, 530 U.S. 793 (2000).
- Northwest Ordinance* (1789), Statutes at Large, Library of Congress, [On-line], URL: <http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=175>.
- Orwell, George (1949), 1984, [On-line], URL: <http://www.george-orwell.org/1984>.
- The Proceedings of the Convention of Delegates, Held at the Capitol in the City of Williamsburg, in the Colony of Virginia, on Monday the 6th of May, 1776* (1776), (Williamsburg, VA: Alexander Purdie).
- Wallace v. Jaffree*, 472 U.S. 38 (1985).
- Washington, George (1789), “The Thanksgiving Proclamation” in *The Papers of George Washington*, [On-line], URL: <http://gwpapers.virginia.edu/documents/thanksgiving/transcript.html>.
- Washington, George (1796), “Farewell Address,” The Avalon Project at Yale Law School, [On-line], URL: http://avalon.law.yale.edu/18th_century/washing.asp.
- Zelman v. Simmons-Harris*, 536 U.S. (2002).





NOTE FROM THE EDITOR

APOLOGETICS
PRESS, INC.

A MEDLEY OF MATTERS: BOUND VOLUMES, WEB SITE, & NEW VBS

At this time each year, we offer to readers the bound volumes of our two monthly magazines from the previous year. These bound volumes enable the articles contained therein to remain relevant far beyond the time period during which they were authored. The bound volume of *Reason & Revelation* for 2009 contains several meaningful articles, including: The Wonders of God's Creation; Viewing Darwin in Light of 150 Years of Error; A Review of the PBS NOVA Television Documentary *Judgment Day: Intelligent Design on Trial*; How Important is the Bible to America's Survival?; The Jackhammer in Your Back Yard; The RNA World Hypothesis Explained and Unexplained; A Response to *The 21st Century Science Coalition* Standards of Science Education; The Problem of Evil; Did The Bible Writers Commit Biological Blunders?; The Bible's Buried Secrets; Is the Book of Mormon from God?; Of Apes & Men: Chromosome 2 in Humans and the Chimpanzee; Was Jesus Misquoted?; and Is God Immoral for Killing Innocent Children? As always, this beautifully bound annual collation contains all 12 issues for the year, as well as an author/title index and a glossy cover. Previous volumes from 1998-2008 are still available. See the advertisement in the *Resources* section of this issue for ordering information.

Additionally, the 2009 bound volume of *Discovery*, our monthly magazine on Scripture and science for children, is now available. During 2009, *Discovery* contained articles on such timely topics as: Arctic and

Antarctica (Walruses, Polar bears, Leopard Seals); Worship; Birds (Hummingbird, Woodpecker, Mallee Fowl); Reptiles (Snakes and Dinosaurs); Lying; Trees; Archaeology and the Bible (Hezekiah's Tunnel, Moabite Stone, Pilate Inscription); Mammals; the Tower of Babel; Alleged Human Evolution (Lucy, Neanderthals); Age of the Earth; Attitudes of the Early Church (Bold, Humble, Generous); and many others. These themes and topics will build the faith of children and insulate them against unbelief. We also have in stock bound volumes for 1998-2008. Please be reminded that for both *Discovery* and *Reason & Revelation*, whenever the bound volumes go out of print, they are gone forever; we do not reprint them. So be sure to order your copies soon.

2009 was another record-breaking year for the A.P. Web site. We received over 4.5 million page hits from individuals located in some 179 countries! The Web is an avenue of evangelistic outreach unprecedented in human history. A.P. is working hard to take advantage of it!

One additional bit of exciting news: A.P. is about to release a Creation VBS curriculum. More details next month.

Dave Miller

See the Center Spread
for Pricing

